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NTSB Order No. EA-4512

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 19th day of December, 1996

_____	)	
LINDA HALL DASCHLE,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-14036
v.	)	
	)	
THOMAS M. CRIST,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent has appealed the oral initial decision and order issued by Administrative Law Judge Patrick G. Geraghty on September 20, 1995, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed the Administrator's order suspending respondent's commercial pilot certificate for 60 days, on allegations that he violated sections 91.119(b) and

<sup>1</sup> An excerpt from the hearing transcript containing the initial decision is attached.

91.13(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91, as a result of a low flight over a congested area that is alleged to have occurred on August 30, 1994.<sup>2</sup>

The sole issue raised on appeal is whether the Administrator's failure to preserve and produce FAA and/or Air Force radar data that may have tracked the alleged low flight, adversely affected respondent's ability to defend against the allegations so as to require dismissal of the Administrator's order. The Administrator has filed a brief in reply, urging the Board to affirm the law judge's decision. For the reasons that follow, we deny the appeal.

Two California Highway Patrol (CHP) officers testified that they observed respondent operate his aircraft below 1,000 feet over Rancho Solano, a golf course community with 1,500 homes, on the day in question. The two officers were on patrol in an aircraft in the area at the time of their observations.

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<sup>2</sup> FAR §§ 91.119(b) and 91.13(a) provide, in pertinent part as follows:

**§ 91.119 Minimum safe altitudes: General.**

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes ....

(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

**§ 91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Officer Nielsen was the pilot of the CHP aircraft. He has been a CHP pilot for 5 years. Officer Nielsen testified that he observed numerous aircraft during his patrol, but he saw only one aircraft operating below his aircraft. He testified that the aircraft was a blue and white Cessna. Once the aircraft was observed, he testified, the CHP aircraft began to follow it. The aircraft, according to Officer Nielsen, descended into an area west of Vacaville, California, admittedly a sparsely populated area, and then was observed operating at 200 to 300 feet over numerous homes. The aircraft then climbed to 1,500 feet and turned east. Officer Nielsen testified that he saw the aircraft registration number and it was N733CV. On cross examination, Officer Nielsen testified that he has a great deal of experience in measuring distances and estimating altitudes.

Officer Morton, Officer Nielsen's partner on the day in question, testified that he also read and verified the registration number of the aircraft, and that he then never took his eyes off the violator. He estimates that the violator's aircraft operated at 200 feet from power lines. He bases his estimate on his 13 years of experience as a police officer, including 10 years patrolling in helicopters. Officer Morton testified that the CHP aircraft was equipped with an altimeter.

FAA Inspector Leippe also testified on behalf of the Administrator. She explained that she took the complaint from CHP and determined that respondent owned the aircraft that CHP had observed. When she called respondent, he initially stated

that he did not fly his aircraft that day, but that another person may have. That person subsequently proved that he was out of town on the day in question. Inspector Leippe then checked the airport fuel log and determined that respondent had fueled the aircraft that day. She then checked respondent's logbook and determined that he had entered a notation that he had operated N733CV from Napa Airport to Davis and back on the day in question. According to the inspector, this is the area where the alleged low flight took place.

During the course of her investigation, Inspector Leippe reconstructed the flight by having the CHP fly her over the Rancho Solano area. Photographs of the area that she took were introduced into evidence by the Administrator. Inspector Leippe subsequently threw away the rest of the film that was in the camera, as well as the notes she took during the investigation.<sup>3</sup>

Respondent now admits that he operated Civil Aircraft N733CV, a Cessna 172, in the area of Vacaville, California, where the low flight is alleged to have occurred on the day and time in question. He asserts, however, that he would not and did not operate his aircraft at low altitudes over homes, and that another aircraft had to have been in the area. Respondent argues that the officers are mistaken in their observations. He claims

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<sup>3</sup> Respondent also asserts on appeal that the destruction of the film and notes was an intentional destruction of evidence that affected his ability to defend himself, but he fails to explain how the materials could have helped his case. We agree with the law judge that there is no merit to this contention because there is no evidence of prejudice.

that another blue and white Cessna 172 model is based at Napa Airport, and its registration number is N73HZ. Respondent produced an expert who testified that the CHP's observation of respondent's aircraft could have been a visual illusion.

Respondent did not produce other evidence to support his theory that the CHP must have misidentified his aircraft as that of the violator. Apparently, no radar data existed relating to this incident, at least at the time it was requested by respondent during the discovery phase of the proceedings and in other, unrelated actions that are not before us.<sup>4</sup> His inability to prove that his aircraft was not operated below altitude minimums, respondent contends, was a direct result of the Administrator's intentional failure to preserve and produce whatever radar data may have existed. Respondent asserts that the law judge therefore erred in refusing to draw an adverse inference against the Administrator because he hindered respondent's defense.

We have considered this issue before. See, e.g., Administrator v. Meili, 7 NTSB 1022, 1025 (1991), aff'd 8 F.3d 28 (9<sup>th</sup> Circuit 1993); Administrator v. Rauhofer, 7 NTSB 765, 766 (1991); and Administrator v. Peist, 7 NTSB 1014, 1016 (1991). So long as the Administrator establishes his allegations by a preponderance of the substantial, reliable, and probative evidence, the Board will not second-guess his decision not to

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<sup>4</sup> Respondent also made requests under the Freedom of Information Act and the Privacy Act.

produce radar, or any other additional evidence.<sup>5</sup> It is within a prosecutor's discretion to determine the type and amount of evidence that is necessary to make a persuasive case. In this case, for example, even if radar evidence existed it would have been cumulative of the witnesses' testimony, and the prosecutor could have found it unnecessary to introduce such evidence in order to meet his burden of proof.

This is not to say, however, that if there is convincing evidence that the Administrator's employees intentionally withheld or destroyed exculpatory evidence, some remedy might not be appropriate in a given matter.<sup>6</sup> However, this is not the case here. First, there is no evidence that radar data tracking

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<sup>5</sup> *But cf. Administrator v. Ryan*, 7 NTSB 649 (1990) where the Board declined to reverse a law judge's credibility finding and initial decision in favor of a pilot who claimed that a ground air traffic controller had authorized him to enter a terminal control area after take off, and pilot's subsequent conversation with a TRACON controller showed that he had asked FAA to preserve all of the tapes of his conversations with air traffic so he could prove his claim, but FAA failed to preserve tapes of communications with ground control during the relevant time period.)

<sup>6</sup> A rule permitting a law judge to draw an adverse inference against a party that fails to cooperate in a timely request for the preservation of evidence has recently been incorporated in our Rules of Practice. See 49 CFR 821.19(d). The rule provides:

**§821.19 Depositions and other discovery.**

(d) Failure to provide or preserve evidence.

The failure of any party to comply with an order of an administrative law judge compelling discovery or to cooperate in a timely request for the preservation of evidence may result in a negative inference against that party with respect to the matter sought and not provided or preserved, a preclusion order, or dismissal.

respondent's aircraft ever existed.<sup>7</sup> The only hint of such a possibility in the record is the law judge's reference in his decision to Exhibit C-1, the CHP Officers' written statement, which indicates that Travis Air Force base approach control initially notified CHP that an unidentified aircraft was coming up on the left side of the CHP aircraft. (TR-258.) However, we do not know if the Air Force generated data as a result of their observations of a civilian aircraft, nor will we speculate as to their procedures.<sup>8</sup>

In any event, even assuming that radar data did exist, and even assuming that it could have been exculpatory, Board precedent, *supra*, suggests that relief may be had only where there is evidence that the Administrator's actual destruction of such evidence occurred, and that the destruction was intentional.<sup>9</sup> In the case before us, there is absolutely no corroboration of respondent's claim that the FAA intentionally destroyed relevant radar data.

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<sup>7</sup> Respondent claims that the FAA inspector admitted destruction of radar data in a deposition, a claim that the Administrator vehemently denies. Since no proffer of the transcript was made, we are unable to evaluate this claim.

<sup>8</sup> Respondent offered no evidence that the FAA tracked his aircraft.

<sup>9</sup> We reject respondent's suggestion that the inspector's purposeful destruction of her notes and film when she no longer needed them, somehow shows that she also intentionally destroyed radar data.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's initial decision is affirmed; and
3. The 60-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.<sup>10</sup>

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

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<sup>10</sup> For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).